

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 16, 2014

v

JOHN EARL O’CONNOR,

No. 312843
Wexford Circuit Court
LC Nos. 2012-010210-FH
2012-010211-FH
2012-010212-FH

Defendant-Appellant.

Before: WHITBECK, P.J., and FITZGERALD and O’CONNELL, JJ.

PER CURIAM.

Defendant, John Earl O’Connor, appeals as of right his convictions of two counts of delivering marijuana¹ and one count of maintaining a drug house² as a second-offense habitual offender³ following a jury trial. The trial court declared a mistrial on one count of possession of diazepam, one count of possession with the intent to deliver marijuana, and one count of maintaining a drug house. The trial court sentenced O’Connor to serve twenty-one to seventy-two months’ imprisonment for his marijuana convictions and 330 days’ imprisonment for his drug house conviction. Because O’Connor was not entitled to assert a defense under § 8 of the Michigan Medical Marihuana Act⁴ (the act) and because O’Connor waived his claim that the trial court’s procedures coerced the jury, we affirm.

I. FACTS

A. BACKGROUND FACTS

Missaukee County Sheriff Deputy Andrew Knapp testified that Terry Crane acted as a confidential informant in exchange for the prosecutor dismissing the charges on an unrelated

¹ MCL 333.7401(2)(d)(iii).

² MCL 333.7405(1)(d).

³ MCL 769.10.

⁴ This Court will use the more common spelling of “marijuana” throughout this opinion.

arrest. Crane testified that he knew O'Connor "[o]ff and on" since he was 16 or 17. Deputy Knapp testified that Crane agreed to purchase marijuana from O'Connor's home.

Deputy Knapp testified that Crane purchased two bags of marijuana at O'Connor's home on March 3, 2010. Deputy Knapp testified that Crane purchased marijuana from O'Connor's home again on March 23, 2010. Wexford County Sheriff Deputy Nathan Edwards testified that when he executed O'Connor's arrest warrant on January 24, 2012, he found a bag of marijuana in O'Connor's gun safe and a bag of marijuana and blue pills in his back yard.

B. ASSERTION OF § 8 DEFENSE

During cross-examination, Crane testified that he had a medical marijuana card and could not remember whether he told O'Connor that he had a card. The prosecution challenged this testimony on the grounds that it did not comply with the act. The trial court sustained the objection, ruling that any reference to medical marijuana must comply with the act.

Defense counsel subsequently brought a motion to present a defense under § 8 of the act. Defense counsel conceded that O'Connor was not a licensed caregiver, but asserted that a person need not be registered to assert a § 8 defense. The prosecutor asserted in part that O'Connor had not properly raised the issue in a pretrial evidentiary hearing. The trial court denied defense counsel's motion to present a § 8 defense on the grounds that (1) O'Connor had not timely raised the issue and (2) there were no genuine issues of material fact concerning whether O'Connor was a licensed caregiver or whether Crane was qualified to use marijuana. The trial court prohibited defense counsel from mentioning medical marijuana for the remainder of trial.

C. JURY DELIBERATIONS

At the beginning of voir dire, the trial court informed potential jurors that it expected the trial to last for two days. One potential juror stated that she might have trouble obtaining child care for the second day of trial but, in response to questioning by the trial court, indicated that she would try. The potential juror was ultimately selected as a juror.

At the close of proofs on the second day of trial, the trial court instructed the jury that it must reach a unanimous verdict and dismissed it for deliberations at 1:56 p.m. At 5:20 p.m., the trial court informed counsel that it intended to ask the jury whether it was close to reaching a verdict. The trial court recognized that it previously told the jurors that trial would last two days, but stated that it would ask the jurors whether they could continue deliberations into the evening or return the next day. Defense counsel stated that he had no objections.

The trial court recalled the jury and asked the foreperson whether the jury was close to reaching a verdict. The foreperson responded that the jury was not. The trial court asked whether the jury could continue deliberations into the evening. One juror indicated that continuing deliberations after 11:00 p.m. would not be feasible. The trial court asked whether the jury could continue deliberations the next day, and two jurors stated that deliberating the next day would not be feasible. The trial court indicated that it would ask the jury about its progress in half an hour and instructed it to continue deliberations.

At 6:03 p.m., the jury sent a note to the trial court that stated that it could not reach a unanimous decision. The trial court read a deadlock instruction to the jury and to instruct the jury to determine whether further deliberations would be successful. Defense counsel stated that he had no objection to this procedure.

After the trial court sent the jury for further deliberations, the trial court stated that if the jury was unable to reach a unanimous verdict on all the charges, it would have the jury deliver its verdict on any charges on which it had a unanimous verdict and declare a mistrial on the remaining charges. Defense counsel requested a mistrial on all charges, but the trial court denied defense counsel's request. The trial court recalled the jury at 6:35 p.m. and instructed the jury accordingly. The foreperson indicated that the jury was making progress, and the trial court excused the jury for further deliberations. The trial court then asked the parties whether they had any objection to the procedure, and defense counsel stated that he did not have any objections.

At 8:38 p.m., the jury sent the trial court a note indicating that it had reached a verdict on three charges, but that it could not reach a verdict on the other three charges. The trial court informed the parties that it intended to ask the foreperson whether further deliberation would result in a verdict on the remaining three charges. After the trial court recalled the jury, the foreperson stated that the jury could not reach a verdict on the three remaining charges. The trial court declared a mistrial on those charges.

II. DEFENSE UNDER § 8 OF THE ACT

A. STANDARD OF REVIEW

This Court reviews de novo issues of statutory interpretation.⁵ This Court reviews de novo the trial court's interpretation and application of the act.⁶

B. LEGAL STANDARDS

The act protects individuals to the extent that they use marijuana in accordance with it, but it “does *not* create a general right for individuals to use and possess marijuana in Michigan.”⁷ The act provides an affirmative defense to charges involving the medical use of marijuana.⁸ In pertinent part, § 8 provides that

(a) Except as provided in [MCL 333.26427], a patient and a patient's primary caregiver, if any, may assert the medical purpose for using marihuana as a defense

⁵ *People v Kolanek*, 491 Mich 382, 393; 817 NW2d 528 (2012); *People v Redden*, 290 Mich App 65, 76; 799 NW2d 184 (2010).

⁶ *People v Anderson (On Remand)*, 298 Mich App 10, 14-15; 825 NW2d 641 (2012).

⁷ *Kolanek*, 491 Mich at 393-394 (emphasis in original); MCL 333.26427(a).

⁸ *Kolanek*, 491 Mich at 396.

to any prosecution involving marihuana, and this defense shall be presumed valid where the evidence shows that:

(1) A physician has stated that, in the physician’s professional opinion, after having completed a full assessment of the patient’s medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient’s serious or debilitating medical condition or symptoms of the patient’s serious or debilitating medical condition;

(2) The patient and the patient’s primary caregiver, if any, were collectively in possession of a quantity of marihuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient’s serious or debilitating medical condition or symptoms of the patient’s serious or debilitating medical condition; and

(3) The patient and the patient’s primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana or paraphernalia relating to the use of marihuana to treat or alleviate the patient’s serious or debilitating medical condition or symptoms of the patient’s serious or debilitating medical condition.

(b) A person may assert the medical purpose for using marihuana in a motion to dismiss, and the charges shall be dismissed following an evidentiary hearing where the person shows the elements listed in subsection (a). . . .^[9]

A person need not be a “qualifying patient” under § 4 of the act to assert a defense under § 8.¹⁰ “[T]he § 8 affirmative defense is available to unregistered patients.”¹¹

C. APPLYING THE STANDARDS

O’Connor asserts that the trial court improperly denied his motion to present a § 8 defense because the defense is available to unregistered patients, including unregistered caregivers. We conclude that the trial court properly dismissed O’Connor’s untimely motion.

MCL 333.26427(b) requires a person to bring a *pretrial* evidentiary hearing to prove the elements of MCL 333.26427(a)—the defense cannot be asserted for the first time at trial.¹² Here, O’Connor moved to present a § 8 defense at the conclusion of the first day of trial. Thus,

⁹ MCL 333.26428.

¹⁰ *Kolanek*, 491 Mich at 401.

¹¹ *Id.* at 402.

¹² *Id.* at 411.

O'Connor did not comply with the provisions of the act because he asserted the defense for the first time during trial. We conclude that the trial court did not err by denying O'Connor's motion to present a § 8 defense.

III. JURY COERCION

A. STANDARD OF REVIEW

Generally, a trial court may not coerce a jury into reaching a verdict and this Court reviews a claim that the court coerced the jury on a case-by-case basis, considering all the facts and circumstances to determine whether the verdict was unfair.¹³ However, a party may not “create[] the very error that it wishes to correct on appeal.”¹⁴

B. LEGAL STANDARDS

A waiver is an “intentional relinquishment or abandonment of a known right.”¹⁵ A defendant's waiver forfeits appellate review of a claimed deprivation of a right.¹⁶ A defendant waives a right by expressly approving of the trial court's action.¹⁷

B. APPLYING THE STANDARDS

O'Connor asserts that the trial court's process deprived him of a fair trial because the trial court told the jury that the trial would only last two days and its procedures implicitly pressured the jury to reach a compromise verdict. We conclude that O'Connor has waived this issue.

Here, the trial court initially informed the jurors that the trial would last two days. When it became apparent that deliberations would extend beyond two days, the trial court proposed to determine whether it would be feasible to extend the trial into the evening. After determining to extend the trial into the evening, the trial court determined to declare a mistrial on the charges on which the jury could not reach a unanimous verdict. Defense counsel repeatedly and explicitly approved of these procedures. To the extent that defense counsel did *not* approve of the trial court's procedures—when defense counsel asserted that the trial court should declare a mistrial on all, rather than some, of the charges—O'Connor does not pursue this issue on appeal and has

¹³ *Jenkins v United States*, 380 US 445, 446; 85 S Ct 1059; 13 L Ed 2d 957 (1965); *People v Malone*, 180 Mich App 347, 352; 447 NW2d 157 (1989).

¹⁴ *People v Szalma*, 487 Mich 708, 726; 790 NW2d 662 (2010).

¹⁵ *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (quotation marks and citation omitted); *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quotation marks and citation omitted).

¹⁶ *Carter*, 462 Mich at 215.

¹⁷ *Id.* at 216.

therefore abandoned it.¹⁸ Thus, we conclude that O'Connor has waived his assertion that the trial court's procedures deprived him of a fair trial.

We affirm.

/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell

¹⁸ See *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004).